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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

C.R. JOHNSON (Mrs.), et al.,

Petitioners,

v.

AMERICAN AIRLINES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in view of this Court's opinion in *Trans World Airlines, Inc. v. Thurston*, the court of appeals erred in finding that an air carrier may deny crewmembers the opportunity to serve as flight engineers after age sixty on the basis of their inability to serve as captains.

2. Whether an employer can meet its burden of proving that age is a "bona fide occupational qualification" with evidence based on factors other than age and the ability to perform the particular job in question.

3. Whether the jury was properly instructed on the bona fide occupational qualification defense.

PARTIES

The plaintiffs-appellants below were:

Leroy F. Berkebile, Charles H. Cate, William F. Ciocys, Byron S. Cramblet, Thomas P. Fenton, George E. Green, Hubert L. Henderson, John P. Jastrab, C.R. Johnson (Mrs. Joyce), Fred G. Johnson (Mrs. Lucille), Louis F. Mahoney, William E. Maki, John W. Malandro, Frederick J. McGinn, Edwin F. McNeil, O.D. Peterson, Fay Reay, Daniel M. Regan, DeWitt T. Ross, Jr., Ralph A. Seifert, Bernard J. Thompson, and Edgar L. Vassar.

American Airlines, Inc. was defendant-appellee.

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OCTOBER TERM, 1984

C.R. JOHNSON (Mrs.), et al.,

Petitioners,

v.

AMERICAN AIRLINES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners C.R. Johnson (Mrs.), *et al.*, respectfully pray that a writ of certiorari issue to review the decision of the court below.[1]

---

[1] The following abbreviations are used in this brief: "A____" refers to the Appendix to this brief; "Tr." designates pages in the trial transcript; "R.E." refers to excerpts of the record filed in the court below; "PX" and "DX" refer to plaintiffs' and defendant's trial exhibits, respectively.

OPINIONS BELOW

The opinion of the Court of Appeals is officially reported at 745 F.2d 988 and appears in the Appendix hereto at page A1. The judgment of the district court is reproduced at page A13. The district court's decision denying respondent's motion for summary judgment is reported at 31 Empl.Prac.Dec. [CCH] ¶33,417 and is reproduced in the Appendix hereto at page A15.

JURISDICTION

The judgment of the Court of Appeals was entered on November 8, 1984. No petition for rehearing was filed. This petition is filed within 90 days of the judgment below. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). Jurisdiction in the district court was based on 29 U.S.C. §§216 and 626(c).

STATUTES AND REGULATIONS INVOLVED

Sections 4(a)(1) and (2) of the Age Discrimination in Employment Act, 29 U.S.C. §623(a)(1) and (2), provide:

> It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age. . . .

Sections 4(f)(1) and 4(f)(2) of the ADEA, 29 U.S.C. §623(f)(1) and (2), provide:

> It shall not be unlawful for an employer, employment agency or labor organization—
>
> (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age. . . .
>
> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act because of the age of such individual.

Part 121.383(c) of the Federal Air Regulations, 14 C.F.R. §121.383(c), provides:

> No certificate holder may use the services of any person as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday. No person may serve as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday.

STATEMENT OF THE CASE

Petitioners in these actions under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §621 *et seq.*, are former flight deck crewmembers for respondent American Airlines, Inc. who were forced to retire upon reaching their sixtieth birthdays. Seventeen of the twenty-two petitioners were captains, four were flight engineers, and one served as a captain until a few months before his sixtieth birthday, when he downbid and commenced flight engineer training.[2] They alleged that respondent violated ADEA Section 4(a), 29 U.S.C. §623(a), in refusing to allow the captain petitioners to transfer to the flight engineer position and in requiring all petitioners, including those serving as flight engineers, to retire at sixty.[3] Respondent denied the violations and asserted that its actions were excused under two exceptions to the ADEA:

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[2] Respondent employs two groups of crewmembers in the position designated by the Federal Aviation Administration as "flight engineer." It uses the term "career flight engineer" to refer to individuals employed before 1964 who, under a labor agreement, are permitted to remain permanently in the flight engineer position (Tr. 113). Respondent permits these individuals to work until age seventy. As of October 1982, 145 of respondent's 450 to 480 career flight engineers were over sixty years of age (PX 708; Tr. 120). "Flight Officers" are crewmembers hired since 1964, serving as flight engineers, who have the opportunity to advance to copilot and captain positions. The duties of the two groups of flight engineers are identical (Tr. 110-116). This brief will use "flight engineer" to refer to both categories of employees, except where reference to "career flight engineers" is appropriate.

[3] The company gave all petitioners the same explanation for denying their requests for continued employment past age sixty: "You are considered a pilot by American Airlines and are subject to retirement at age 60, regardless of the qualifications you hold or the cockpit seat in which you are serving on that date." (R.E. 70, 71).

first, that age under sixty is a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of its business, and second, that the differentiation is based upon reasonable factors other than age (RFOA). 29 U.S.C. §623(f)(1).

Shortly before trial, respondent moved for summary judgment, based on the RFOA defense and a new contention that its actions were taken to "observe the terms of a bona fide seniority system." 29 U.S.C. §623(f)(2). Respondent denied that its actions were based on age, asserting that "[i]t is only because plaintiffs are disqualified from serving as Captain and Copilots by the FAA that American does not permit them to serve as Flight Officers" (A18). The court denied summary judgment and also concluded that the two defenses were unavailable as a matter of law (A16). Finding that "younger pilots are permitted to downbid and older pilots approaching 60" are not, the court ruled that respondent's practice could not be justified by "reasonable factors other than age" (A18). Furthermore, since the plaintiffs sought to preserve their seniority rights and were not attacking the seniority system, the "bona fide seniority system" defense was not applicable (A21-A22).[4]

At trial, respondent's evidence related to the same theories presented in its summary judgment motion: first, that its "up or out" policy required flight engineers (except "career flight engineers") to be "capable of progressing" to pilot positions so as not to block the flight engineer seat (the seat-blocking defense),[5] and second, that

[4] Respondent's motions for reconsideration and for certification to file an interlocutory appeal were denied (R.E. 54, 57). It did not appeal or cross-appeal from the summary judgment ruling.

[5] Respondent's "up or out" policy required crewmembers to qualify for the next higher position when they became most senior

(Footnote continued on following page)

permitting the captain petitioners to serve as flight engineers, subordinate to younger, less experienced captains, could interfere with the crew concept and endanger safety (the back-seat driver defense). This evidence was presented to support two incompatible positions: a *denial* that respondent's actions were age-based, and an *admission* that the actions were age-based, coupled with a contention that they were justified as a BFOQ.

The jury returned a verdict for respondent. Answering two special interrogatories, it found, first, that age was a determining factor in respondent's policy not to allow each plaintiff to occupy or to continue to occupy the flight officer position, and second, that, with respect to each plaintiff, the policy was based on a BFOQ (R.E. 35-36).

Following the denial of their motion for new trial (R.E. 40), plaintiffs appealed to the United States Court of Appeals for the Fifth Circuit, which affirmed (A2). The court held that a BFOQ may be based upon an "up or out" policy, as well as on factors other than age and ability to perform the particular job (A4-A8). It also found that the jury had been correctly instructed on the BFOQ affirmative defense (A8-A10), and that respondent had presented evidence to support the jury's finding on BFOQ (A10-A11).

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[5] *continued*
at their base (DX 2, §23-H). Once a crewmember qualified as a captain, however, he satisfied the "up or out" policy, and did not need to do so again the remainder of his career (Tr. 164-67, 309-10, 316, 321, 324). Respondent's management testified that a captain could bid to flight engineer and remain in that position until he was required to retire at age sixty (Tr. 129-31, 443-44, 687; *see* R.E. 71). Plaintiffs had all satisfied the "up or out" policy, except for the four flight engineer plaintiffs who did not have sufficient seniority to be requested to advance to copilot at their base (Tr. 167).

REASONS FOR GRANTING THE WRIT

1. The Fifth Circuit's opinion is squarely in conflict with this Court's recent decision in *Trans World Airlines, Inc. v. Thurston*, 53 U.S.L.W. 4024 (U.S. Jan. 8, 1985). The court below approved a BFOQ which was based not on petitioners' inability to perform the flight engineer job, but rather on their inability to serve as captains after age sixty due to the FAA's "age 60 rule," 14 C.F.R. §121.383(c). This finding is precisely contrary to this Court's decision in *TWA*, which held that a BFOQ must be based on the " 'particular' position of flight engineer," and cannot be based on an age limitation for a different position:

> Nothing in the legislative history cited by petitioners indicates a congressional intention to allow an employer to discriminate against an older worker seeking to transfer to another position, on the ground that age was a BFOQ for his *former* job.

53 U.S.L.W. at 4027.[6]

Like TWA, respondent permits downbidding and "bumping" by younger pilots in a variety of situations.[7] Since

[6] The Court will consider the question of BFOQ for the particular position in the public employment context in *Johnson v. Mayor and City Council of Baltimore* and *EEOC v. Mayor and City Council of Baltimore, cert. granted*, 53 U.S.L.W. 3506 (U.S. Jan. 14, 1985) (Nos. 84-518 and 84-710).

[7] From May 1980 through October 1982, 803 crewmembers under sixty transferred from captain to copilot or from copilot to flight engineer (R.E. 82, 93). Two, including petitioner Fred G. Johnson, transferred from captain to flight engineer (Tr. 176, 694-95). In addition, following a merger in the 1970's, ten captains on another airline began serving as flight engineers for respondent (PX 724; R.E. 81). Other reasons for downbidding include increased salary, personal preference regarding vacation or work schedules and working conditions, as well as downbids due to reductions in force (Tr. 145-46, 332-33, 681-82).

downbidding and "bumping" ("transfers") by younger pilots are freely permitted, and since the "up or out" policy is satisfied for life once a pilot reaches captain (Tr. 324), the only proficient crewmembers who stand to lose their employment under the policy are those reaching age sixty.[8] This policy thus is discriminatory on its face (A18); *see TWA*, 53 U.S.L.W. at 4026. The forced retirement of petitioners violates the ban on mandatory retirement in the 1978 ADEA amendments, 29 U.S.C. §623(f)(2), and cannot be justified as a BFOQ. *TWA*, 53 U.S.L.W. at 4027.

Certiorari should be granted to conform respondent's practice to the *TWA* decision and to assure a uniform standard in the airline industry on the age sixty flight engineer issue. The rights of crewmembers on different carriers should not rest on semantic variations of the same argument. Whether presented as a BFOQ for captains or as a BFOQ for those not "capable of progressing" to captain, a policy precluding flight engineer service after age sixty is not sustainable under the ADEA.

2. The ADEA contains a narrow exception permitting age-based discrimination where "*age* is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. §623(f)(1) (emphasis added). The Fifth Circuit's determination that a BFOQ may be proved by evidence *not* based on age or ability to perform the "particular" job is at odds with *TWA* and the decisions of other circuits and presents an important question of statutory interpretation warranting review by this Court.

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[8] The policy is also riddled with exceptions. The 450-480 remaining "career flight engineers," including those who merged into respondent's operations in the 1970's, are not required to progress to pilot ranks (Tr. 113).

Respondent's BFOQ defense focused on its "seat blocking" argument, an adjunct to the "up or out" policy. Respondent claimed that it used the flight engineer position as a training seat for future pilots and that if too many ex-captains became flight engineers the training seats would be blocked and safety might be endangered.[9] This is the antithesis of a BFOQ in every respect: (1) it has nothing to do with the *age* of the individual, contrary to the plain language of the Act; (2) it has no relationship "to the actual ability of the employee to perform his or her assigned job," *ALPA v. TWA*, 713 F.2d 940, 951 (2d Cir. 1983), *aff'd in part, rev'd in part sub nom. TWA v. Thurston*, 53 U.S.L.W. 4024 (U.S. Jan. 8, 1985); and (3) it concededly does not apply to the petitioners themselves, but rather to hypothetical pilots who might follow in future years.[10]

Similarly, the "back seat driver" argument was not based either on age or age-related performance, but rather

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[9] The "seat blocking" argument rested on the hypothesis that all 1,000 pilots turning age sixty within the next ten years would request transfers to flight engineer and work to age seventy (Tr. 419-20, 466-68). In contrast, only 10% of the pilots reaching age sixty between 1978 and 1984 sought flight engineer employment by joining this action (Tr. 465-66). Further, respondent's novice flight engineers served on the B-727, which has 1,000 to 1,200 flight engineer positions. The 22 petitioners would serve at the DC-10 flight engineer position, which is not a "training seat" (Tr. 227-28). Respondent also employed flight engineers on B-747 and B-707 aircraft, and operated DC-9 and B-767 aircraft with two pilots and no flight engineer (Tr. 23).

[10] Even assuming that there might someday be enough age sixty downbidders to block training seats, it still does not satisfy the statutory requirement that the defense can be proven only where age *is* a BFOQ, rather than where, in the distant future, it *will be* a BFOQ.

on prior service as a captain.[11] Respondent's management asserted that the defense would apply to all persons who had served as captains "even if it was just for one day" (Tr. 478).[12] Because there was no age basis for the job qualification under this argument, by definition it cannot constitute a BFOQ. *Smallwood v. United Air Lines, Inc.*, 661 F.2d 303 (4th Cir. 1981), *cert. denied*, 456 U.S. 1007 (1982).[13]

The decision below fails to recognize that an age limitation sought to be justified as a BFOQ must be based on the excluded persons' age-related inability to perform the job. The court's holding, which invites employers to introduce evidence unrelated to age in support of a BFOQ,

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[11] Respondent did not assert this defense against the four petitioners who were in the flight engineer position at age sixty. Thus, the "back seat driver" argument is not sufficient by itself to sustain the verdict against all petitioners.

[12] In contrast, petitioners' evidence showed that "senior captains, FAA officials, and American management and training personnel had in the past ridden in the cockpit without endangering safety" (A11, n.4), and that 803 crewmembers under sixty had downbid, including many who had previously served as captains (R.E. 82, 93). Petitioners also presented testimony from several of the more than 100 former captains who have served as flight engineers after age sixty on other major commercial airlines (Tr. 247-90, 357-61; R.E. 72, 78).

[13] The decision below is squarely in conflict with *Smallwood*, which involved a maximum hiring age for pilots. In a striking parallel to this case, the airline based its BFOQ defense in part on possible disruption to the "crew concept" associated with moving from command to a subordinate position. While agreeing that the crew concept was safety-related, the court held it to be "of no help to United in claiming a BFOQ exception for its hiring practices":

> [T]here is no reliable evidence that United's "crew concept" would be impaired by the sole factor of hiring Flight Officers, starting as Second Officers, over the age of 35. This alleged harm to the "crew concept" is a function of prior experience, not age at hire.

661 F.2d at 307-08.

would permit the "extremely narrow" BFOQ exception to swallow the rule against discrimination on account of age. *See Houghton v. McDonnell Douglas Corp.*, 553 F.2d 561, 564 (8th Cir.), *cert. denied*, 434 U.S. 966 (1977).[14]

3. Finally, the Court should grant certiorari to review the BFOQ instruction. The charge given here did not tie the need for the limitation to the age of the individuals affected and explicitly allowed consideration of "more than simply the individual plaintiff's ability to perform the tasks of the flight officer job" by instructing that:

> You may also consider the effect that allowing plaintiffs to serve as flight officers would have on the safety of American's operation because of its effect on its other employees, crew command structure, training program, *or any other reason relating to safety.*

(A24) (emphasis added).

This instruction is inconsistent with the BFOQ test in *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976), which has been adopted by all circuits to consider the issue.[15] *Tamiami* follows the statutory require-

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[14] Other courts, recognizing the narrowness of the BFOQ exception, have held that explicit age-based policies cannot be justified by factors "other than age." *Smallwood, supra*, 661 F.2d at 307-09; *Marshall v. Westinghouse Electric Corp.*, 576 F.2d 588, 591 (5th Cir. 1978); *EEOC v. County of Allegheny*, 519 F.Supp. 1328 (W.D. Pa. 1981), *aff'd*, 705 F.2d 679 (3d Cir. 1983); *EEOC v. Marathon County*, 27 Empl.Prac.Dec. [CCH] ¶32,274 (W.D. Wis. 1981); *Marshall v. Goodyear Tire and Rubber Co.*, 19 Empl.Prac.Dec. [CCH] ¶8973 (W.D. Tenn. 1979). This is consistent with the Court's interpretation of the BFOQ exception under Title VII. *Dothard v. Rawlinson*, 433 U.S. 321, 336 (1977).

[15] *See, e.g., Orzel v. City of Wauwatosa Fire Department*, 697 F.2d 743, 753 (7th Cir.), *cert. denied*, 104 S.Ct. 484 (1983); *Tuohy v. Ford Motor Co.*, 675 F.2d 842, 845 (6th Cir. 1982); *EEOC v. City of St. Paul*, 671 F.2d 1162, 1166 and n.7 (8th Cir. 1982); *EEOC v. County of Santa Barbara*, 666 F.2d 373, 376 (9th Cir.

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ment that the qualification, based on *age*, be reasonably necessary to the particular business. It focuses on the ability to assess the job performance of persons over the age limit on an individualized basis. 531 F.2d at 235-36. The instruction also was erroneous in that it required respondent to demonstrate only a "reasonable basis" for its policy, rather than prove that the age limitation is "reasonably *necessary*," as required by the statute. 29 U.S.C. §623(f)(1); *see Tuohy v. Ford Motor Co.*, 675 F.2d 842, 845 (6th Cir. 1982) (employer must prove retirement policy for corporate pilots is reasonably necessary, rather than merely "reasonable"); *Harriss v. Pan American World Airways, Inc.*, 649 F.2d 670, 676-77 (9th Cir. 1980) (rejecting "reasonable" standard for proving flight attendant pregnancy policy a BFOQ).

This Court has under review the appropriate standard for a BFOQ instruction in another age-sixty flight engineer case. *Western Air Lines, Inc. v. Criswell*, No. 83-1545 (oral argument held January 14, 1985). In light of the pendency of that case, certiorari should be granted to review the BFOQ instruction given here against the correct standard.

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[15] *continued*

1982); *Stewart v. Smith*, 673 F.2d 485, 491 n.26 (D.C. Cir. 1982); *Arritt v. Grisell*, 567 F.2d 1267, 1271 (4th Cir. 1977); *Houghton v. McDonnell Douglas Corp.*, 553 F.2d 561, 564 (8th Cir.), *cert. denied*, 434 U.S. 966 (1977); *see Mahoney v. Trabucco*, 738 F.2d 35, 38 (1st Cir.), *cert. denied*, 105 S.Ct. 513 (1984).

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the opinion and judgment of the Fifth Circuit.

Respectfully submitted,

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APPENDIX

Joyce M. JOHNSON, As Executrix of the Estate of C.R. Johnson, Deceased, Hubert L. Henderson, and Charles H. Cate, For and in Behalf of Themselves and All Others Similarly Situated, Plaintiffs-Appellants,

v.

AMERICAN AIRLINES, INC., Defendant-Appellee.

Lucille D. JOHNSON, As Executrix of the Estate of Fred G. Johnson, Deceased, Plaintiff-Appellant,

v.

AMERICAN AIRLINES, INC., Defendant-Appellee.

No. 83-1610.

United States Court of Appeals,
Fifth Circuit.

Nov. 8, 1984.

Before GARZA, REAVLEY and JOHNSON, Circuit Judges.

REAVLEY, Circuit Judge:

Twenty-two employees of American Airlines brought an action against American alleging violation of the Age Discrimination in Employment Act (ADEA). 29 U.S.C. §§ 621-634 (1982). The ADEA provides that,

> It shall be unlawful for an employer--
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; [or]

> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age;

29 U.S.C. § 623(a) (1982). The district court dismissed plaintiffs' action upon a jury verdict in favor of American. We affirm.

The operating crew of most aircraft in American's fleet consists of a captain, copilot, and flight officer. The captain is in command of all aspects of the aircraft and its crew. The copilot is second in command and assists the captain in flying the aircraft. The flight officer monitors the aircraft's fuel, electrical, hydraulic and other systems before, during, and after the flight but does not do any piloting of the aircraft.

In 1964, as a result of the increased operational complexity of jet aircraft and an alarming number of American aircraft accidents in the early 1960's, American altered its cockpit crew training and hiring policies. The hiring policy adopted was to hire only future captains as flight officers[1] and to require crew members to train and qualify for the next highest cockpit position, to which one would move in accordance with seniority and American's needs. Under this up-or-out policy, if a crew member is ever unable to progress to the next highest cockpit position, he or she must transfer to a noncockpit position or be terminated.

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[1] Prior to the adoption of this policy American hired mechanics to fill the position now held by flight officers. Known as flight engineers, these mechanics did not progress to pilot positions. With the exception of ten flight engineers acquired through merger with another airline, American has hired no flight engineers since 1964. American still employs approximately 450-480 flight engineers.

The present ADEA action arose as a result of the effect of American's up-or-out policy in conjunction with the so-called FAA age sixty rule. Under the age sixty rule, captains and copilots for commercial aircraft carriers are required to retire from these positions at age sixty. 14 C.F.R. § 121.383(c) (1984). The age sixty rule does not apply to flight officers. However, because American's up-or-out policy requires flight officers to be capable of advancing to pilot positions and because pilots must retire at sixty, American's flight officers must also retire or transfer to noncockpit positions at age sixty.

Plaintiffs in this action are or were American flight crew members who desire to continue in the flight officer position after their sixtieth birthdays. Plaintiffs claim that American's refusal to employ them as flight officers violates the ADEA.

American denied that it discriminated on the basis of age and argued alternatively that the up-or-out policy was a bona fide occupational qualification (BFOQ). The ADEA provides that an employer may discriminate on the basis of age if the employee's age is a BFOQ. 29 U.S.C. § 623(f)(1) (1982). American presented evidence that employing ex-captains who could not advance to the pilot position would block that position from use as a training seat for future pilots (seat blocking). American also introduced evidence that some ex-captains in the flight officer position (and it would be impossible to predict which ex-captains) would endanger the safety of American flights by disrupting crew coordination and reverting to captaincy behavior in times of emergencies (back seat driving). American also introduced into evidence over plaintiffs' timely objection the amount of two plaintiffs' lump sum retirements.

The issues on appeal are: first, whether a BFOQ defense must be solely related to age; second, whether the district court erred in instructing the jury regarding the BFOQ defense; third, whether there was an absolute absence of evidence to establish a BFOQ defense; and fourth, whether the district court erred in admitting evidence of plaintiffs' retirement benefits.

1. Whether a BFOQ Defense Must Be Related Solely to Age

Plaintiffs, in attacking the jury instructions and sufficiency of the evidence, assert that the BFOQ defense must relate solely to age and the employee's ability to perform the job assigned. Applying the facts of this case, plaintiffs argue that American's seat blocking and back seat driver contentions cannot, as a matter of law, be grounds for a BFOQ defense, because they are related to factors of American's overall training procedures and the ex-captain's seniority and experience.

The BFOQ defense is regarded as a narrow exception to the general prohibition against age discrimination. *Air Line Pilots Association v. Trans World Airlines, Inc.*, 713 F.2d 940, 951 (2d Cir.1983), *cert. granted sub nom. Trans World Airlines, Inc. v. Thurston*, ____ U.S. ____, 104 S.Ct. 1412, 1706, 79 L.Ed.2d 739 (1984). No opinion has fully addressed the issue whether a BFOQ defense must relate solely to the employee's age. Two decisions, however, have reached opposite results without much discussion on the issue. First, *Smallwood v. United Air Lines, Inc.*, 661 F.2d 303, 308 (4th Cir.1981), *cert. denied*, 456 U.S. 1007, 102 S.Ct. 2299, 73 L.Ed.2d 1302 (1982), held that the airline could not defend its maximum hiring age of thirty-five as a BFOQ, because the alleged harm to the cockpit crew was a function of seniority and not age. On

the other hand, in *Murnane v. American Airlines, Inc.*, 667 F.2d 98 (D.C.Cir.1981), *cert. denied*, 456 U.S. 915, 102 S.Ct. 1770, 72 L.Ed.2d 174 (1982), the court allowed the use of the BFOQ defense to uphold the airline's maximum hiring age of forty. The court held that a BFOQ defense could be based on a combination of factors including age, along with the effects of the age sixty rule, lengthy training requirements, and experience. Id. at 100-01.

The objective of a court called upon to interpret a statute is to ascertain congressional intent and give effect to legislative will. *Philbrook v. Glodgett*, 421 U.S. 707, 713, 95 S.Ct. 1893, 1898, 44 L.Ed.2d 525 (1975). The most obvious place to find congressional intent is in the statute. The ADEA states:

> (a) The Congress hereby finds and declares that—
>
> (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;
>
> (2) *the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons*;
>
> (3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;
>
> (4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.
>
> (b) *It is therefore the purpose of this chapter* to promote employment of older persons based on their ability

> rather than age; *to prohibit arbitrary age discrimination in employment*; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

29 U.S.C. § 621 (1982) (emphasis added). Our inquiry is aided by narrowing the prohibited conduct to *arbitrary* age discrimination.

The hearings provide some guidance as to the scope of the BFOQ defense. First, Senator Randolph was concerned that the ADEA would force airlines to hire older pilots who would retire shortly after the airlines had spent thousands of dollars over many years in training. *Age Discrimination in Employment: Hearings on S. 830 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. 48-49 (1967). Secretary of Labor Wirtz responded that section 4(f)(1), which contained the BFOQ and reasonable basis other than age[2] defenses, would provide airlines with a defense. *Id.*

Second, Senator Javits, the prime sponsor of the ADEA, propounded written questions to a New York government official on the application of the BFOQ defense under New York age discrimination statute, one of the state age discrimination laws after which the ADEA was modeled. *Id.* at 242. The response stated that,

---

[2] It shall not be unlawful for an employer, employment agency, or labor organization—

. . . . .

> to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual.

29 U.S.C. § 623(f)(2) (1982).

> Consideration may be given to age as a bona fide occupational qualification in *such circumstances, among others,* as the following:
>
> (a) Where age is a bona fide factor in connection with job performance.
>
> (b) *Where age is a bona fide factor in an apprentice training or on-the-job training program of long duration.*
>
> (c) Where age is a bona fide factor in fulfilling the provisions of other statutes (e.g., laws regulating employment of minors and females).

Id. (prepared written answer of Commissioner Conway, New York State Commission for Human Rights) (emphasis added). Based on the above evidence, the subcommittee that held hearings on the ADEA was cognizant of, and apparently satisfied with, the notion that the BFOQ defense need not relate solely to age and the ability to perform the assigned job.[3]

Regulations promulgated by the Department of Labor, the administrative body responsible for interpreting and administering the ADEA, should also be given considerable respect in interpreting the scope of the BFOQ

---

[3] The above evidence indicates even more strongly that the length of on-the-job training and ability of the employer to recoup its investment can constitute a BFOQ defense. This position, however, was rejected in *Smallwood v. United Air Lines, Inc.*, 661 F.2d 303 (4th Cir. 1981), *cert. denied*, 456 U.S. 1007, 102 S.Ct. 2299, 73 L.Ed.2d 1302 (1982). The *Smallwood* court relied on 29 C.F.R. § 806.103(h) (1980) and *City of Los Angeles v. Manhart*, 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978), to support its position. Neither authority, however regards the BFOQ defense. The regulation concerns the other defense in 29 U.S.C. § 623(f)(1) (1982), reasonable factors other than age. The Supreme Court decision merely rejects cost justification as a rebuttal to a prima facie showing of sex discrimination. *City of Los Angeles*, 435 U.S. at 716 & n. 31, 98 S.Ct. at 1379 & n. 31, 55 L.Ed.2d at 670 & n. 31.

defense. *See Ford Motor Credit Co. v. Cenance*, 452 U.S. 155, 158 n. 3, 101 S.Ct. 2239, 2241 n. 3, 68 L.Ed.2d 744 (1981). The BFOQ regulation recognizes that a BFOQ defense permits federal statutory and regulatory compulsory retirement provisions imposed to protect public safety without reference to the individual's ability to perform the job. 29 C.F.R. § 860.102(d) (1983). Again, the government body responsible for interpreting the ADEA recognizes that a BFOQ defense does not have to relate solely to the employee's age and ability to perform the job assigned.

Our inquiry must also be guided by 49 U.S.C. § 1421(b) (1982), which imposes on airlines the duty to perform their services with the highest degree of safety. Accordingly, "the airline industry must be accorded great leeway and discretion in determining the manner in which it may be operated *most safely*." *Murnane v. American Airlines, Inc.*, 667 F.2d 98, 101 (D.C.Cir. 1981), *cert. denied*, 456 U.S. 915, 102 S.Ct. 1770, 72 L.Ed.2d 174 (1982). Courts simply do not possess the expertise with which to supplant their judgment in the best manner airlines can obtain that highest degree of safety for that of the airlines. *Id.*

We conclude that American's reasons for its policy qualify as a BFOQ defense.

2. Whether District Court Erred in Instructing the Jury on the BFOQ Defense

Plaintiffs next urge that the BFOQ instruction was confusing and misstated the applicable standard of proof. The challenged instruction read:

> One of the requirements for a bona fide occupational qualification is that it is *reasonably necessary* to the

> essence, or normal operation, of the employer's business, which in this case is the safe transportation of passengers. American need only show that it has a *reasonable basis* for its assessment of the safety risk involved.
>
> American may show its policy is *reasonably necessary* to safety and is thus a bona fide occupational qualification in either one of two ways: American may show that there is a factual basis for believing that all or substantially all persons excluded by its policy would be unable to perform safely and efficiently as flight officers for American after having lost their ability to serve as pilots; or American may show that it is impossible or impractical to determine on an individual basis which ones can safely perform, thereby justifying a reasonable, general rule. In determining whether American has a *reasonable basis* for believing that Plaintiffs would be unable to safely perform as flight officers, you may consider more than simply the individual Plaintiff's ability to perform the tasks of the flight officer job. You may also consider the effect that allowing Plaintiffs to serve as flight officers would have on the safety of American's operation because of its effect on its other employees, crew command structure, training program or any other reason relating to safety.

(emphasis added).

It is well settled in the Fifth Circuit that in order to prevail on a BFOQ defense, the employer must establish:

> [first,] the classification must be *reasonably necessary* to the essence of the employer's business; [and second,] the employer must have *reasonable cause*, that is, a factual basis, for believing either that all or substantially all persons within the excluded class would be unable to perform safely and efficiently the duties of the job or that it is impossible or impractical to deal with persons over the age limit on an individualized basis.

EEOC v. University of Texas Health Science Center, 710 F.2d 1091, 1093 (5th Cir.1983) (emphases omitted and added).

Comparing the challenged jury instruction and the correct statement of the law, we hold that the jury instruction was correct. In the first paragraph of the jury instruction, the first sentence correctly states the first prong of the BFOQ test, and the second sentence merely summarizes the second prong. In the second paragraph of the challenged jury instruction, the district court referred to the first prong and then properly and fully discussed the second prong.

3. Whether There was an Absolute Absence of Evidence to Establish a BFOQ Defense

Because plaintiffs failed to move for a directed verdict and judgment notwithstanding the verdict, this court's review of the evidence is limited to whether there was *any* evidence to support the jury verdict. *Coughlin v. Capitol Cement Co.*, 571 F.2d 290, 297 (5th Cir.1978).

In their briefs, plaintiffs assert that there was an absolute absence of evidence establishing a BFOQ defense, because American's evidence was not related to age and ability to perform the assigned job. We, however, have already held that factors other than age and ability to perform may be considered in establishing a BFOQ defense.

Furthermore, we hold that there was evidence to support the jury's verdict in favor of American. First, American presented evidence that it used the third crew position to train future pilots and that the possibility existed that so many ex-captains would become flight officers that the training position would be blocked and that safety

would possibly be endangered. Second, American presented two expert witnesses who testified that in their opinion the presence of senior ex-captains in the position of third crew member created a possible hazardous situation, and that it was impossible to determine which ex-captains would pose a safety hazard.[4]

Finally, plaintiffs argue that the above evidence was introduced by American to prove that it was not discriminating on the basis of age and cannot now be used on appeal to prove the BFOQ defense. The court finds no support in the record for plaintiffs' claim that the evidence was so limited. Furthermore, if evidence was there for the jury to consider, it now may support its verdict.

4. Whether the District Court Erred in Admitting Evidence of Plaintiffs' Retirement Benefits

Plaintiffs' final contention on appeal is that the trial court abused its discretion in permitting American to introduce evidence of lump sum retirements of two of the plaintiffs.[5] Plaintiffs claim that the evidence was irrele-

---

[4] Plaintiffs presented evidence to rebut American's BFOQ evidence. First, plaintiffs introduced evidence that the 450-480 permanent flight engineers created a greater seat blocking problem in American's training program than would the 22 plaintiffs. Second, plaintiffs introduced evidence that senior captains, FAA officials, and American management and training personnel had in the past ridden in the cockpit without endangering safety. Although whether a BFOQ defense is permitted where the employer allows exceptions is currently pending before the Supreme Court, *Trans World Airlines, Inc. v. Thurston*, ____ U.S. ____, 104 S.Ct. 1412, 1706, 79 L.Ed.2d 739 (1984), the issue has not been presented to this court.

[5] Plaintiffs also discuss the testimony of Thomas Quinn who testified that American would have saved money by employing plaintiffs after age sixty and suspending their pension benefits. Because this testimony was heard out of the jury's presence by the district court, Mr. Quinn's testimony need not be considered.

vant and highly prejudicial, because it led the jury to believe that plaintiffs were well-heeled and not in need of gainful employment. American argues, on the other hand, that it sought to use the evidence to prove that it would have saved money by employing plaintiffs after age sixty and suspending their pension benefits, and, therefore, its safety motivation was sincere.

We hold that the district court did not commit reversible error in admitting the evidence. First, motive is often very important in discrimination actions. *See, e.g., Pullman-Standard v. Swint*, 456 U.S. 273, 277, 102 S.Ct. 1781, 1784, 72 L.Ed.2d 66, 72-73 (1982) (challenge to seniority system under Title VII requires showing of intent to discriminate racially). Second, the admission of evidence is largely within the discretion of the trial court, *Reichenbach v. Smith*, 528 F.2d 1072, 1074 (5th Cir.1976), and the trial court will be reversed only if the party asserting the error proves that substantial rights were adversely affected, *Crumpton v. Confederation Life Insurance*, 672 F.2d 1248, 1253 (5th Cir.1982). Plaintiffs do not demonstrate that their rights were substantially adversely affected.

The judgment is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

C. R. JOHNSON, ET AL., *Plaintiffs*	)	
v.	)	Civil Action No. CA-3-80-0434-D
AMERICAN AIRLINES, INC., *Defendant*	)	
		(Consolidated)
FRED G. JOHNSON, *Plaintiff*	)	
v.	)	Civil Action No. CA-3-81-1020-D
AMERICAN AIRLINES, INC., *Defendant*	)	

JUDGMENT
[Dated June 27, 1983]

This action came on for trial before the Court and a jury, Honorable Robert M. Hill, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is ORDERED and ADJUDGED that the plaintiffs take nothing, that the action be dismissed on the merits, and that the defendant American Airlines, Inc., recover of the plaintiffs Leroy Berkebile, Charles H. Cate, William F. Ciocys, Byron S. Cramblet, Thomas P. Fenton, George E. Green, Hubert L. Henderson, John P. Jastrab, C. R.

Johnson (Mrs.), Fred G. Johnson (Mrs.), Louis F. Mahoney, William E. Maki, John W. Malandro, Frederick McGinn, Edwin F. McNeil, Orwin Donald Peterson, Fay Reay, Daniel M. Regan, De Witt T. Ross, Jr., Ralph Seifert, Bernard J. Thompson, and Edgar L. Vassar its costs of action.

Dated at Dallas, Texas, this 27 day of June, 1983.

/s/ Robert M. Hill
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

C. R. JOHNSON, ET AL, *Plaintiffs*	)	
v.	)	Civil Action No. CA-3-80-0434-D
AMERICAN AIRLINES, INC., *Defendant*	)	
		(Consolidated)
FRED G. JOHNSON, *Plaintiff*	)	
v.	)	Civil Action No. CA-3-81-1020-D
AMERICAN AIRLINES, INC., *Defendant*	)	

ORDER
[Dated February 21, 1983]

Came on for consideration before the Court Defendant American Airline, Inc.'s (American) Motion for Summary Judgment. Plaintiffs C. R. Johnson, *et al* brought this action under the Age Discrimination in Employment Act 29 U.S.C. §621 *et seq.* (ADEA), to challenge American's policy of prohibiting pilots 60 years or older from transferring to the position of flight officer. American sought summary judgment based on the following two statutory defenses: (1) American's practice is based on reasonable factors other than age (RFOTA), and (2) American's prac-

tice is in observance of the terms of a bona fide seniority system. 29 U.S.C. §623(f)(1) & (2). After considering the parties' arguments, in light of the applicable law, the Court is of the opinion that American is not entitled to summary judgment. The Court further concludes that these defenses are unavailable to American as a matter of law.

Factual Background

A majority of the plaintiffs are former pilots who have been disqualified from service with American as captain or copilot through the application of the Federal Aviation Administration Age 60 Rule. 14 C.F.R. §121.383(c). Plaintiffs question their exclusion from the position of flight officer, to which the FAA Rule 60 does not apply.

A brief review of American's cockpit personnel policies is necessary to an understanding of this case. There are three cockpit positions in American's aircraft: captain, copilot, and third crew member. The third crew member may be either a flight engineer, who is a career third crew member and is not permitted or required to qualify for a higher position, or a flight officer, who is expected to progress to the position of copilot and, eventually, captain. American no longer hires flight engineers as such. Current flight engineers hold their positions pursuant to the Tripartite Agreement entered into between American, the Flight Engineers International Association, and the Allied Pilots Association (APA) in 1964. The Tripartite Agreement will remain in effect for as long as any flight engineer remains an active employee. At this time approximately 500 flight engineers are employed by American. Flight engineers are permitted to work until reaching 70 years of age.

The Tripartite Agreement provided for two independent seniority lists, the Flight Engineer System Seniority List and the Pilot System Seniority List. Each flight engineer has priority and seniority over all pilots, including flight officers, for bidding on third crew member positions. Captains, copilots, and flight officers have been included on a combined seniority list since 1965. The Pilots Agreement, between American and pilots represented by the APA, provides that seniority shall govern all matters of promotion, retention in case of work force reduction, recalls from furlough, and assignments, subject to the terms of the Tripartite Agreement.

Seniority also determines when a pilot is expected to qualify for a higher position under American's "up or out" line of progression practice. American's internal procedures provide as follows:

> There can be no such person as a permanent First Officer or Flight Officer in American Airlines. If the Company is to progress, pilots must be ready for upgrading when their services in higher capacities are required. Whenever it is determined that a pilot is incapable of progression into the next higher job category, the individual must be transferred into some other line of work or be dismissed from the service of American Airlines.

Flight Department Administrative Guide—Technical, §2.04, p.1. The Pilot Agreement itself states simply that all pilots are required to qualify in turn for the next higher pilot category.

While a pilot is expected to satisfy the "up or out" standards, he need not bid for the highest position for which he is qualified. The practice of bidding for a vacancy in a lower position is known as "down bidding." American contends, however, that it may call upon the services

of a pilot who has down bid to assume a higher position for which he is qualified. Because pilots below the age of 60 are permitted to downbid, plaintiffs contend that American's refusal to permit pilots approaching their 60th birthday to bid into such positions is unlawfully discriminatory.

REASONABLE FACTOR OTHER THAN AGE (RFOTA)

Section 4(f)(1) of the ADEA provides that it "shall not be unlawful for an employer . . . to take any action otherwise prohibited [by the Act] . . . where the differentiation is based on reasonable factors other than age." 29 U.S.C. §623(f)(1). American argues that its refusal to allow age-disqualified pilots to serve as flight officers is based on legitimate considerations of safety, including maintenance of the crew command concept and the need to train pilots. Additionally, American relies upon its adherence to the Tripartite Agreement and the Pilot Agreement as reasonable factors explaining the differentiation.

The Court finds that the RFOTA defense is unavailable to American in the present context. American argues that its differentiation is not based on age and that "[i]t is only because plaintiffs are disqualified from serving as Captain and Copilots by the FAA that American does not permit them to serve as Flight Officers." American would have the Court overlook the fact that younger pilots are permitted to downbid and older pilots approaching age 60 disqualification are not permitted to do so. Whether lawful or unlawful, this is an example of disparate treatment.

In *EEOC v. County of Allegheny*, 519 F.Supp. 1328 (W.D. Pa. 1981), the county sought to justify its refusal to hire policemen over 35 years of age by claiming the county code provided for such a limitation and therefore,

that the differentiation was "statute dependent" rather than age dependent. The county argued that its attempted compliance with the county code was a reasonable factor other than age. Rejecting this analysis, the Court responded,

> [E]ven if the County proved that it adopted the age limitation based upon a good faith belief concerning its obligations under state law this would not fall within the "reasonable factor" justification. Whatever its motive, the fact remains that in hiring police officers the County based its employment decisions on the age of the applicant.

Id. at 1335. Here, as in *Allegheny*, the different treatment was triggered by or coincided a difference in age.

American's "reasonable factors" are generalizations; they are not the facts and circumstances peculiar to one employee, such as is characteristic of the RFOTA defense. The RFOTA defense is an attack on the plaintiff's prima facie case through which the defendant says that the employee was not treated a certain way because of his age, but because of his excessive absences, physical fitness, general inability, or other legitimate consideration.

The Court's finding that an age-related determination has been made suggests that American might attempt to transform its claimed justifications into a bona fide occupational qualification (BFOQ) defense. The Fifth Circuit's distinctions between RFOTA and BFOQ defenses confirm that American cannot rely on the RFOTA defense for an across the board immunization of its practices. When the BFOQ is invoked as a matter of confession and avoidance the burden shifts to the employer to justify its generalized treatment of a certain class of employees. *Marshall v. Westinghouse Elec. Corp.*, 576 F.2d 588, 591 (5th Cir. 1978). The operation of the BFOQ defense "per-

mits the employer to deal with an entire class of persons on an age-related basis in derogation of the statute." *Id.* at 591 n.3. This is clearly what American is attempting to do.

Under the undisputed material facts presented to the Court by both parties, American is not entitled to judgment under the RFOTA defense. These same undisputed facts show that, as a matter of law, the RFOTA defense presented to the Court is unavailable to American.

BONA FIDE SENIORITY SYSTEM

Citing language in a variety of documents, including the Tripartite Agreement, the Pilot Agreement, and the American Technical Manual, American argues that it is merely observing the terms of a bona fide seniority system. Section 4(f)(2) of the ADEA provides it shall not be unlawful for an employer "to observe the terms of a bona fide seniority system . . . which is not a subterfuge to evade the purposes of [the ADEA], except that . . . no such seniority system . . . shall require or permit the involuntary retirement of an individual because of the age of such individual." 29 U.S.C. §[6]23(f)(2).

As a preliminary matter, the Court notes the plaintiffs' objection to American's failure to raise a proper seniority system defense in its Answer. The Court has received American's Motion to Amend, but finds that a consideration of either American's motion or Plaintiffs' objections is unnecessary because of the Court's present ruling that American's practice is not sanctioned by the bona fide seniority system exception.

In support of its seniority system defense American cites the company's up or out policy, the pilot line of progression, the company's right to require flight officers to

serve as copilot and captain as needed to run the operation, and the requirement that all pilots have the potential of serving as captain. In addition to isolated express language from various documents, American quotes certain "ancillary rules" which it claims to observe in refusing to permit pilots who are disqualified from serving as captain or copilot to serve as flight officers.

There are a number of problems with American's defense. First, the plaintiffs are seeking to preserve their rights under the existing pilot seniority system; no attack is made on any provision of the seniority system. *See Stone v. Western Airlines, Inc.*, 544 F.Supp. 33, 37 (C.D. Cal. 1982). Secondly, American's interpretation of the seniority system defense would defeat the purposes of the ADEA. While the official legislative history of the ADEA provides no assistance, there is some helpful discussion of the seniority system in the recorded debates surrounding the passage of the ADEA. Senator Yarborough explains that both the seniority system and the employee benefit plan exceptions were included to encourage hiring of older employees and to allay concerns that older employees would have to be accorded benefits disproportionate to their actual length of service. 113 Cong. Rec. 31254-55 (November 6, 1967). The Interpretative Regulations promulgated by the Department of Labor, and later by the EEOC, also suggest that American's reliance on provisions not relating to benefits commensurate with length of service is misplaced. *See* 29 C.F.R. §860.105 (Department of Labor); 29 C.F.R. §1625.8 (EEOC).

The ADEA seniority system defense does not suffer from overuse. The absence of case law interpretation presents two equally disturbing possibilities: ignoring the defense altogether or crediting it with more than Congress contemplated. In this instance American's reference

to the aggregate of written and unwritten provisions in order to terminate the seniority rights of older pilots does not fall within the protection of the seniority system defense.

The Court is not saying that the provisions supporting American's seniority system defense are to be ignored. American is free to present the policies embodied in these provisions in support of a possible BFOQ defense. At this point, the provisions themselves do not provide an explanation for the plaintiffs' inability to downbid to flight officer positions. A majority of the plaintiffs, according to the undisputed facts, satisfied the express provisions by qualifying for higher positions when called upon to do so. As to those plaintiffs who retired before reaching the position of captain or those who are still pilots but have not progressed to the highest position, American has not suggested that they failed to qualify for a higher position when called upon to do so. Thus, American's refusal to permit downbidding to flight officer is not in observance of the provisions cited. Written and unwritten provisions which do not fall within the seniority system defense cannot be made superior to statutory rights. American must show that at the time of the alleged discrimination the employee failed to satisfy a specific provision and that such failure was a reasonable factor other than age, or that the company was relying upon a generalized rule which embodies a bona fide occupational qualification.

CONCLUSION

The undisputed facts presented to the Court show that American is not entitled to judgment as a matter of law. The Court further finds that American may not rely upon either the RFOTA or the bona fide seniority system defenses as presented in its Motion for Summary Judgment.

Finally, the Court finds, in light of its disposition of the seniority system defense, that no ruling is necessary on American's motion to amend its answer.

It is so ORDERED.

Dated this 21 day of February, 1983.

/s/ Robert M. Hill
United States District Judge

COURT'S CHARGE TO THE JURY

* * *

Bona Fide Occupational Qualification

If you find that plaintiffs have proven by a preponderance of the evidence that their inability to continue in or transfer to the flight officers position was the result of policies in which age was a determining factor, then you must consider American's affirmative defense that age is a bona fide occupational qualification. One of the requirements for a bona fide occupational qualification is that it be reasonably necessary to the essence, or normal operation, of the employer's business, which in this case is the safe transportation of passengers. American need only show that it has a reasonable basis for its assessment of the safety risk involved.

American may show its policy is reasonably necessary to safety and is thus a bona fide occupational qualification in either one of two ways: American may show that there is a factual basis for believing that all or substantially all persons excluded by its policy would be unable to perform safely and efficiently as flight officers for American after having lost their ability to serve as pilots; or American may show that it is impossible or impractical to determine on an individual basis which ones can safely perform, thereby justifying a reasonable, general rule. In determining whether American has a reasonable basis for believing that plaintiffs would be unable to safely perform as flight officers, you may consider more than simply the individual plaintiffs' ability to perform the tasks of the flight officer job. You may also consider the effect that allowing plaintiffs to serve as flight officers would have on the safety of American's operation because of its effect on its other employees, crew command structure, training program, or any other reason relating to safety.

* * *

R.E. 68.

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CLERK

No. 84-1271

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

C. R. JOHNSON (MRS.), *et al.*,
Petitioners,

v.

AMERICAN AIRLINES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are more properly stated as follows:

1. Whether this Court's opinion in *Trans World Airlines, Inc. v. Thurston*—where TWA did not contend that age is a bona fide occupational qualification ("BFOQ") for its flight officer position—precludes all other airlines from proving that age is a BFOQ for their flight officer positions.

2. Whether an airline can establish a BFOQ defense based upon evidence that an employment policy alleged to discriminate on account of age is reasonably necessary for the safety of flight operations.

3. Whether the trial court's jury instruction on the BFOQ defense—which several times stated that American Airlines had to prove "that age is a bona fide occupational qualification . . . reasonably necessary to the essence" of American's business—properly stated the statutory BFOQ standard.

Pursuant to Rule 28.1, American's parent company is AMR Corporation and its affiliates are AMR Energy Corporation AA Training Corporation, AA Training Limited, Flagship International Inc., Skyships Inc., Skyships of Wisconsin Inc. Rainbow House Inc., Skyships Of Alabama Inc., Skyships Of Toronto, Skylogan Corp. AMR Service Corporation, AMR Capitol Corp., El Paso Terminal Corporation, and San Antonio Terminal Corporation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1271

C. R. JOHNSON (MRS.), *et al.*,
Petitioners,

v.

AMERICAN AIRLINES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

STATUTES INVOLVED

Several statutory provisions not recited in the Petition are also involved in this case.

The Federal Aviation Act of 1958, as amended, 49 U.S.C. § 1301 *et seq.*, provides, in pertinent part:

49 U.S.C. § 1302(a)(2) (1982):

> (a) In the exercise and performance of its powers and duties under this chapter, the [Civil Aeronautics] Board shall consider the following,

among other things, as being in the public interest, and in accordance with the public convenience and necessity:

* * * *

(2) The prevention of any deterioration in established safety procedures, recognizing the clear intent, encouragement, and dedication of the Congress to the furtherance of the highest degree of safety in air transportation. . . .

49 U.S.C. § 1421(b) (1982):

(b) In prescribing standards, rules, and regulations, and in issuing certificates under this subchapter, the Administrator [of the Federal Aviation Administration] shall give full consideration to the duty upon air carriers to perform their services with the highest possible degree of safety in the public interest.

STATEMENT OF THE CASE

In their "Statement of the Case," Petitioners have recited the evidence which they sought the jury to adopt at trial, but which the jury obviously rejected. Upon consideration of all the evidence, the jury returned a special verdict in which it found that American's policy of not permitting age 60 pilots to serve as flight officers was based on a BFOQ. (Tr. 836-37; R.E. 35-38) The following is a summary of the evidence supporting the jury's special verdict.

American's principal business is the safe transportation of passengers. (Tr. 388-97) Most aircraft in American's fleet have three cockpit positions: captain, copilot, and third crew member. (Tr. 22-25, 371-83) The captain is in command of all aspects of the aircraft and its crew. The copilot is second in command and assists the captain in flying the aircraft. (Tr. 22-25, 385-87)

The third crew member is responsible for, among other things, monitoring the aircraft's fuel, electrical, hydraulic, and other systems. (Tr. 24-26) He or she also observes and participates in American's cockpit procedures employed during flight. (Tr. 367-78)

Prior to the introduction of jet aircraft in the early 1960's, American hired only flight engineers to serve as third crew members. (Tr. 618-20) Those flight engineers generally were not pilots, but were often qualified mechanics. (Tr. 54-57, 618-20) They were responsible for monitoring and sometimes repairing various systems on the aircraft. (*Id.*)

American began introducing jet aircraft into its fleet in the early 1960's. (Tr. 369-74, 620-26) Those new jet aircraft were much more complex and difficult to operate safely than propeller aircraft. (*Id.*) This increased operational complexity contributed to American's losing six jet aircraft in accidents in the early 1960's. (Tr. 370-73, 621) American also lost five other aircraft in accidents during this time, bringing its accident total to an alarming eleven aircraft in a relatively short period. (Tr. 620-22) American then determined, and it has since been reaffirmed, that pilot error is the principal cause of aircraft accidents. (Tr. 621) Because of the high number of accidents in the early 1960's, American decided to alter its pilot hiring and training methods in an attempt to achieve the highest possible degree of safety. (Tr. 373-77, 620-29, 651-52, 715)

The most dramatic step in American's effort to increase safety was its decision in 1964 to hire only pilots for all cockpit positions, instead of hiring mechanics for flight engineer positions. Since 1964, American has not hired any flight engineers. (Tr. 373-76, 651-52, 715) The new pilot-flight officers have been required to advance to copilot and, ultimately, to captain. (Tr. 371-80) American has hired its future captains to serve as flight

officers so that they would spend a training period in the flight officer position, observing all aspects of American's cockpit procedures. (Tr. 373-74, 659-60) The time spent as a flight officer observing and participating in American's cockpit procedures is a critically-important training device for future copilots and captains. (*Id.*)

As part of its policy to hire only future captains, American implemented "up or out" and "capable of progression" policies, which require pilots to train and qualify for the next highest cockpit position as called upon to do so in accordance with their seniority. (Tr. 377-79, 625-30, 657-60) If a pilot is unable to qualify in turn for the next highest pilot category, he must either transfer to a non-cockpit position or be terminated. (Tr. 378-84) Moreover, if at any time a pilot becomes disqualified or otherwise unable to maintain his current pilot status or becomes incapable of progressing to the next highest pilot category, he must either transfer to a non-cockpit position or be terminated. (*Id.*)[1] American's policies result in highly motivated and proficient pilots eventually upgrading to the command position of captain. (Tr. 378-79, 657-61) So as not to disrupt its desired crew command structure, American would not permit any captain, regardless of age, voluntarily to downbid to the flight officer position. (Tr. 220-21, 490-91, 655-56)

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[1] As stated in American's Flight Department Administrative Guide-Technical:

> There can be no such person as a permanent first officer [*i.e.*, copilot] or flight officer in American Airlines. If the company is to progress, pilots must be ready for upgrading when their services in higher capacities are required. Whenever it is determined that a pilot is incapable of progressing to the next higher job category, the individual must be transferred into some other line of work or be dismissed from the service of American Airlines.

(Def. Ex. 13, Sec. 2.04, p. 1; Tr. 383)

The most desirable result of American's pilot hiring, up or out, and capable of progression policies is that the captain, who is in charge of all aspects of the flight, is the cockpit crew member with the most seniority and cockpit experience in American's aircraft. (Tr. 378-89, 659-61) To achieve the highest degree of safety, the pilot in command must be the leader in the cockpit, and should not have his command shared in any respect with other members of the crew who have more seniority or experience than he. (Tr. 493-94, 657-61) The presence of a more senior, more experienced pilot in a lower status pilot position could result in confusion as to who is in charge of the aircraft. (Tr. 492-94, 505-11) Such confusion could be disastrous in an emergency situation, leading to catastrophic results. (*Id.*)

In addition to the up or out and capable of progression policies, American has structured its pay incentives to ensure that all pilots will bid for and occupy the highest pilot seat for which they are qualified. (Tr. 173-74, 704-05) Of course, occasional business downturns resulting in cutbacks in flights may require that the least senior pilots in one category serve in the next lowest category. (Tr. 212-16, 384-87, 702-05) The desired cockpit command structure remains intact in such situations, because the most senior pilots will serve in the highest cockpit positions, while the most junior pilots will serve in the lowest cockpit positions and sustain the accompanying cut in pay. (Tr. 387) Accordingly, the captain at all times will be the most senior and experienced pilot, and thus the undisputed leader of the crew. (Tr. 384-87, 702-05)

American's safety record since 1966 has been one of the best in the world and has far exceeded that of most U.S. air carriers. (Tr. 635) While it is not possible to attribute this impressive safety record to only one policy, it is American's opinion that no alternative policies to the current pilot hiring, up or out, and capable of pro-

gression policies would be as effective in attaining such a high degree of passenger safety. (Tr. 376-77)

Because of American's change in 1964 to hiring only future captains for its cockpit crews, two different types of employees perform the third crew member duties: professional flight engineers and pilot flight officers.[2] Flight engineer is a "career" position at American; no American flight engineer has the right or the obligation to advance to the positions of copilot and captain. (Tr. 58, 112-14) Flight officers, on the other hand, must advance in turn to the higher pilot categories and remain capable of doing so or face either transfer to a non-cockpit position or termination. (Def. Ex. 13, Sec. 2.04, p.1; Tr. 380-84)[3]

American does not allow pilots to serve as flight officers upon their disqualification from serving as captain or copilot by a Federal Air Regulation promulgated by the Federal Aviation Administration in 1960, which precludes pilots from serving in such positions upon reach-

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[2] All of American's flight engineers were hired prior to 1964, with the exception of 10 flight engineers transferred into American's staff, pursuant to the labor protective provisions of the Civil Aeronautics Board, as a result of a merger with Trans Caribbean Airways in 1971. To resolve the jurisdictional dispute between the flight engineers' and the pilots' unions concerning representation of third crew members, American entered into the "Tripartite Agreement," which provided that flight engineers would remain on a separate, closed seniority list and that flight officers would be on the pilot seniority list along with American's captains and copilots. (Tr. 56-58, 112-14)

[3] Petitioners incorrectly state that American forced them to retire at age 60. (Petition, at 4-5) American has no mandatory retirement policy for pilots reaching age 60. Instead, virtually all pilots disqualified from being captains and copilots by the Age 60 Rule choose to retire because of the lucrative pension benefits provided by American to retiring pilots. (Tr. 210-12) However, if any age 60 pilot chose to defer receipt of such pension benefits, he or she could apply and be considered for any non-cockpit position at American. (*Id.*)

ing age 60. 14 C.F.R. § 121.383(c) (the "Age 60 Rule"). American's policy provides that a pilot who is either not capable of continuing to serve or is not capable of progressing to serve as captain or copilot—for whatever reason, including the Age 60 Rule—must be transferred into some other line of work or be dismissed from the company's service. Flight engineers, on the other hand, may continue to serve in their non-pilot occupation until age 70.

American's evidence at trial demonstrated two justifications for its policy of not allowing pilots disqualified by the Age 60 Rule to serve as flight officers. First, if the senior, age 60 pilots were permitted to occupy the entry level flight officer seat, then American's system for training future captains would be severely degraded. (Tr. 207-09, 378-82, 629-34, 658-60, 703-05) American's up or out and capable of progression policies, which preclude any pilot from being a career flight officer, prevent the blocking of the flight officer "training seat." (Def. Ex. 13, Sec. 2.04, p. 1; Tr. 383, 658-61)

Second, American's evidence demonstrated that permitting ex-captains disqualified by the Age 60 Rule to occupy the flight officer seat would endanger the safety of American's flights by creating "role ambiguity" and uncertainty in the cockpit. (Tr. 215-20, 504-11, 548-68, 658-61) American's pilot hiring, up or out, and capable of progression policies result in American cockpit crews which consist of a senior, experienced captain, a less senior, less experienced copilot, and a junior flight officer. The authority of the captain, who must make all critical decisions, is reinforced by the fact that he is the oldest and most experienced crew member. (Tr. 211-12, 387-90, 504-11, 658-61) Thus, there is no doubt who is in charge, and, as is required for safe flight operations, there is only one leader in the cockpit. In order to maintain this desired crew structure, American would not

permit any captain, regardless of his age, to use his seniority to bid a flight officer's seat. (Tr. 220-21, 490-91, 655-56)

Two highly qualified experts testified that age 60 ex-captains serving as flight officers could create dangerous situations in the cockpit. (Tr. 504-11, 550-65) Dr. Lee Bolman of Harvard University testified that, in those potentially catastrophic situations when the cockpit crew faces an equipment malfunction or other emergency, it must be absolutely clear on the flight deck that the captain is in charge. (Tr. 553-58) Dr. Bolman testified that the presence of an age 60 ex-captain as flight officer could undermine the leadership role of the younger, less experienced captain. (*Id.*). Such "role ambiguity" results in confusion in the cockpit over who is in charge. (*Id.*) Dr. Bolman testified "that there have been a lot of cases in which there's been some confusion about who was supposed to do what. It's clear from [investigations of] the accidents that . . . [cockpit] confusion can be serious or fatal for an airplane." (Tr. 555)

Both Dr. Bolman and Dr. Don E. Flinn, Chairman of the Department of Psychiatry at Texas Tech University, testified regarding problems that age 60 ex-captains would have in adjusting from being the pilot-in-command to the subordinate flight officer. (Tr. 508-10, 561-62) Dr. Bolman testified that any inability of an ex-captain to adjust fully to his new, subordinate position could endanger the aircraft in an emergency situation. (Tr. 561-62) Dr. Flinn testified that as people get older, they have more difficulty (*i.e.*, "rigidity") in adjusting from a leadership to a subordinate role. (Tr. 510) Such rigidity could be dangerous in an emergency situation. (*Id.*) A further danger posed by the presence of an age 60 ex-captain as flight officer is that the younger, less experienced captain could be intimidated and, thus, be rendered an ineffective leader. (Tr. 507-10) In short, the pres-

ence of an age 60 ex-captain in the flight officer's seat would add uncertainty and confusion to the cockpit, making the performance of all cockpit crew members less predictable and less safe. (Tr. 508)

Petitioners contended at trial that American discriminated against them in violation of the Age Discrimination in Employment Act, as amended, 29 U.S.C. § 621 *et seq.* ("ADEA"), by refusing to permit them to serve as flight officers past age 60. The jury determined that age was a determining factor in American's policy not to allow Petitioners to occupy or continue to occupy the flight officer position. (Tr. 836-37; R.E. 35-38) The jury also determined, after evaluating Petitioners' evidence and the evidence summarized above, that American's policies were based on a BFOQ. (*Id.*) The United States Court of Appeals for the Fifth Circuit affirmed the jury's verdict. *Johnson v. American Airlines, Inc.*, 745 F.2d 988 (5th Cir. 1984).

SUMMARY OF THE ARGUMENT

Petitioners, in their Statement of the Case, summarized their evidence to the jury and American, in the pages above, has summarized its evidence to the jury. The jury considered each side's evidence and then returned a special verdict in which it concluded that "American's policy not to allow Plaintiffs to occupy or continue to occupy the flight officer position was based on a bona fide occupational qualification." (Tr. 836; R.E. 36) A writ of certiorari is not warranted to review that special verdict, which is based on facts that are unique to this case, and which has already been reviewed and affirmed by the court of appeals below.

This Court's recent decision in *Trans World Airlines, Inc. v. Thurston*, —— U.S. ——, 105 S.Ct. 613 (1985), has no bearing on the jury's special verdict entered in this case. In *Thurston*, TWA did not contend that the

denial of its age-60 captains' requests for transfer to flight engineer positions was based on a BFOQ for the flight engineer position. Instead, TWA only contended that age less than 60 was a BFOQ for the *captain* position. American, on the other hand, contended that its policies precluding pilots' service past age 60 are based on a BFOQ for American's *flight officer* position. *Thurston*—which did not even address whether age 60 is a BFOQ for TWA's flight engineers—does not preclude American from proving that age less than 60 is a BFOQ for its flight officers.

American proved that pilots disqualified by the Age 60 Rule could not safely fill the flight officer position. The jury found the challenged policies to be reasonably necessary to safe flight operations, based upon American's evidence that such policies prevented unsafe conditions in the cockpit and enabled American to train future captains. Such evidence clearly supports a BFOQ determination, as this Court recognized in *Dothard v. Rawlinson*, 433 U.S. 321 (1977). To construe the BFOQ defense as narrowly as suggested by Petitioners would require an airline to employ persons over a certain age even where, as the jury in this case found, to do so would undermine the safety of the airline's flight operations.

Finally, the trial court properly instructed the jury on the BFOQ defense. Read as a whole, the instruction clearly provided that if the jury found that age was a determining factor in the challenged pilot policies, American had to prove that age was a BFOQ "reasonably necessary" to the safety of American's flight operations. The instruction closely followed both the statutory language of the ADEA and also the well-settled BFOQ test articulated in *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976).

REASONS FOR DENYING THE WRIT

I. This Court's Decision In *Thurston* Does Not Prevent An Airline From Proving That Age Is A BFOQ For Its Flight Officer Position

Petitioners contend that the Fifth Circuit opinion below is "squarely in conflict" with this Court's decision in *Trans World Airlines, Inc. v. Thurston*, —— U.S. ——, 105 S.Ct. 613 (1985). *Thurston* and this case, however, are fundamentally different. In *Thurston*, TWA "did not contend that age is a BFOQ for the position of flight engineer." 105 S.Ct. at 623, n.18. American, on the other hand, proved that age is a BFOQ for the *flight officer* position at American. Nothing in *Thurston* suggests that American or any other airline is precluded from proving to a jury that age less than 60 is a BFOQ for its flight officers.[4] The fact is that American and TWA have fundamentally different cockpit crew employment policies and methods of operation.[5] The jury determined that American's approach to maximizing pilot proficiency was reasonably necessary to safe flight operations.

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[4] This Court in *Thurston* held that TWA's pilot downbidding policy, which was very restrictive as applied to age 60 captains seeking to downbid to flight officer, but which was liberal in permitting younger captains to downbid to flight officer, constituted unlawful disparate treatment under the ADEA. That holding is inapposite to the instant case because American would preclude any captain from downbidding to flight officer and would also preclude any pilot from serving in any pilot position if, for *any* reason, he or she became incapable of progessing to the next highest pilot category.

[5] For example, unlike American, TWA has no "up or out" or "capable of progression" policies governing employment of pilots. Unlike American, TWA permits most pilots voluntarily to downbid to lower pilot categories, provided that a vacancy exists. *Thurston*, 105 S.Ct. at 619. Unlike American, TWA permits "medical downbids"; that is, captains disqualified as captains for medical reasons are allowed to "bump" less senior flight engineers. *Id.* Unlike American, TWA has an established practice of downgrading pilots for disciplinary reasons. *Id.*, at 619, n.11. TWA does not have

Petitioners suggest that this Court should grant certiorari to "assure a uniform standard in the airline industry on the age 60 flight engineer issue." (Petition, at 8) American acknowledges that a consistent *legal* standard must apply to all airlines in adopting and implementing pilot employment practices. There are many different ways, however, for an airline to implement employment practices within the scope of the consistent legal standard in order to meet its federal mandate to operate with the "highest possible degree of safety." Reasonable, justifiable differences of opinion among the airlines on the flight officer issues are not precluded by *Thurston.* Petitioners' suggestion that this Court should require all airlines to adopt identical cockpit crew policies is without merit. The BFOQ defense is a case-by-case determination, based upon the facts unique to each employer's business. *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 230-31 (5th Cir. 1976).

II. The Evidence Clearly Supports The Jury's Verdict That American's Pilot Policies Are Based On A BFOQ

The focus of American's evidence at trial was that pilots disqualified by the Age 60 Rule cannot safely fill the flight officer position. Petitioners' contention that American's BFOQ was "proved by evidence not based on age or ability to perform the 'particular' [flight officer] job . . ." (Petition, at 8) totally mischaracterizes the evidence considered by the jury below.[6]

"training seat" or "crew command structure" concepts like those which the jury below held justified American's policies as a BFOQ for the flight officer position.

[6] Petitioners failed to move for a directed verdict and judgment notwithstanding the verdict. Therefore, the question on appeal is not whether there was insufficient evidence to warrant submission

The evidence presented to the jury showed (1) that age 60 ex-captains could not safely fill the *flight officer* job because, *inter alia*, their presence as flight officers would create confusion and uncertainty in the cockpit, and (2) that both ex-captain and non-captain age 60 pilots could not safely fill the flight officer job because they would impede the training of American's future captains.[7] Clearly, Congress did not intend the ADEA to invalidate an employment policy found by a jury to be reasonably necessary to safe flight operations, as in this case.

This Court has held that even if an excluded class of employees has the physical ability to perform a job, a BFOQ may be established if the employer can prove that the overall safety and efficiency of the employer's operation would be jeopardized by permitting such employees to serve in the subject position. *Dothard v. Rawlinson*, 433 U.S. 321 (1977). In *Dothard*, this Court's determination that the employer's policy of excluding women as prison guards constituted a BFOQ was not based on

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of the BFOQ defense to the jury, but whether there was an absolute absence of any evidence capable of supporting the jury's verdict. *Bohrer v. Hanes Corp.*, 715 F.2d 213, 216 (5th Cir. 1983); *Coughlin v. Capitol Cement Co.*, 571 F.2d 290 (5th Cir. 1978). The Fifth Circuit properly held that American's evidence supported the jury verdict.

[7] Petitioners incorrectly allege that American's BFOQ evidence had nothing to do with Petitioners' incapacity due to the aging process. Dr. Flinn testified that age 60 ex-captains could be unsafe as flight officers because "people do become rigid as they get older and I think that it's entirely possible that some senior captains . . . [permitted to fly] as flight engineers would be less able [than younger persons] to . . . slip into the role of a subordinate position." (Tr. 510) Such rigidity brought on by the aging process could create an unsafe cockpit environment. (*Id.*) Even assuming, *arguendo*, that BFOQ evidence had to relate *solely* to the effects of the aging process, Dr. Flinn's expert testimony clearly supports the jury verdict.

any evidence of the physical inability of females to perform the tasks required of prison guards. Instead, this Court relied solely on the fact that the mere presence of a female guard working in a male prison, regardless of her competence, could create an unsafe situation. The Court stated as follows:

> The essence of a correctional counselor's job is to maintain prison security. A woman's relative ability to maintain order in a male, maximum security, unclassified penitentiary of the type Alabama now runs could be directly influenced by her womanhood.
>
> * * * *
>
> The likelihood that inmates would assault a woman because she was a woman would pose a real threat not only to the victim of the assault but also to the basic control of the penitentiary and protection of its inmates and other security personnel. The employee's very womanhood would thus directly undermine her capacity to provide the security that is the essence of a correctional counselor's responsibility.

Dothard, 433 U.S. at 335-36.

The Court made it clear in *Dothard* that in evaluating evidence pertaining to a BFOQ defense, the finder of fact may consider more than a person's physical ability to perform the job, and may consider the employee's effect on the safety of the employer's overall operation. *Accord*, *EEOC v. University of Texas Health Science Center*, 710 F.2d 1091 (5th Cir. 1983); *Murnane v. American Airlines, Inc.*, 667 F.2d 98 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982). In this case, American's evidence showed that to retain pilots disqualified by the Age 60 Rule would both diminish the training of future captains and create unpredictable, unsafe conditions in the cockpit. As held in *Dothard*, such evidence clearly supports a BFOQ.

III. The Trial Court's Jury Instruction Closely Followed The Statutory Language Of The ADEA And The Well-Settled Case Law For The BFOQ Defense

Petitioners allege that the jury instruction was defective because it failed to "tie the need for the limitation [American's policy] to the age of the individuals affected" (Petition, at 11), and also because it required American only to show that its policies have a "reasonable basis" rather than to show that they are "reasonably necessary." (*Id.*, at 12)[8] However, Petitioners failed to object to the instructions on these grounds at trial, and are thus precluded from raising these issues in the Petition.

In any event, the trial court did relate American's claimed BFOQ directly to age on three separate occasions:

> It is not unlawful, however, for an employer to take any action otherwise prohibited by the Act when age is a bona fide occupational qualification . . .

(Tr. 787; p. 6a hereto)

> . . . [If you find that age was a determining factor,] then you must consider American's affirmative defense that age is a bona fide occupational qualification.

(Tr. 789; p. 7a)

> Should you find that age was a determining factor . . . and that age was not a [BFOQ] . . .

(Tr. 790; p. 8a)[9] Moreover, the trial court did, on four separate occasions, instruct the jury that American had

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[8] The Petition, at App. 24, sets forth only a portion of the trial court's charge to the jury regarding the ADEA and the BFOQ defense. The trial court's entire jury charge is set forth at 1a-8a hereto.

[9] Petitioners also contend that the BFOQ instruction was not sufficiently tied to age because the trial court allowed the jury to

to prove that the BFOQ was "reasonably necessary" to the essence of American's business.[10]

Read in its entirety and considered as a whole, the trial court's BFOQ instruction closely followed the statutory language of the ADEA. It also followed the language of the well-accepted guidelines enunciated in

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consider whether allowing Petitioners to serve as flight officers would be unsafe due to their effect on other American employees and on American's flight operations as a whole. (Petition, at 11) A BFOQ, however, need not be based exclusively on evidence of a class of persons' incapacity due to the aging process. As explained at pages 13-14, *supra*, a BFOQ can also be based upon the effect that employment of such class of persons would have on the performance of other employees and on the overall safety of the employer's operations. *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Murnane v. American Airlines, Inc.*, 667 F.2d 98 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982).

[10] The pertinent portions of the trial court's charge are as follows:

> American further contends . . . it [American's pilot policies are] . . . justified as a bona fide occupational qualification *reasonably necessary* to the essence of American's business, which is safety.

(emphasis supplied) (Tr. 786; p. 5a)

> It is not unlawful, however, for an employer to take any action otherwise prohibited by the Act when age is a bona fide occupational qualification *reasonably necessary* for the normal operation of the particular business.

(emphasis supplied) (Tr. 787; p. 6a)

> One of the requirements for a bona fide occupational qualification is that it is *reasonably necessary* to the essence, or normal operation, of the employer's business . . .

(emphasis supplied) (Tr. 789; p. 7a)

> American may show its policy is *reasonably necessary* to safety and thus is a bona fide occupational qualification . . .

(emphasis supplied) (Tr. 789; p. 7a)

Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976).[11]

Finally, Petitioners contend that because this Court is currently reviewing a BFOQ jury instruction in *Western Airlines, Inc. v. Criswell*, (No. 83-1545), the Court should grant certiorari to review the propriety of the instruction in this case. However, the resolution of the legal issues presented in *Criswell* will not affect the outcome of this case. The jury instructions are altogether different. The trial court in this case patterned its charge after *Tamiami*; the trial court in *Criswell* clearly did not. Accordingly, the legal issues in *Criswell* are far different from those raised in the Petition. The legal issues in *Criswell* are whether a BFOQ instruction is defective where, *inter alia*, it fails to accord discretion to the airline in implementing employment policies that promote passenger safety and fails to allow an airline to err, if at all, on the side of passenger safety in resolving bona fide disputes among medical experts concerning safety-related employment policies. The legal issues raised in the Petition are whether the BFOQ was sufficiently tied to age and whether the trial court re-

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[11] Petitioners acknowledge that *Tamiami* sets forth the generally accepted guidelines for the BFOQ defense. (Petition, at 11) The *Tamiami* test for evaluating BFOQ claims has been adopted by virtually every United States Court of Appeals that has considered the scope of the BFOQ exception. *See, e.g., Mahoney v. Trabucco*, 738 F.2d 35 (1st Cir. 1984); *Airline Pilots Association v. Trans World Airlines, Inc.*, 713 F.2d 940 (2d Cir. 1983), *aff'd in part, rev'd in part sub nom. Trans World Airlines, Inc. v. Thurston*, —— U.S. ——, 105 S.Ct. 613 (1985); *Arritt v. Grisell*, 567 F.2d 1267 (4th Cir. 1977); *EEOC v. University of Texas Health Science Center*, 710 F.2d 1091 (5th Cir. 1983); *Tuohy v. Ford Motor Co.*, 675 F.2d 842 (6th Cir. 1982); *Orzel v. City of Wauwatosa Fire Department*, 697 F.2d 743 (7th Cir.), *cert. denied*, 104 S.Ct. 484 (1983); *Hoefelman v. Conservation Comm. of Missouri Dept. of Conservation*, 718 F.2d 281 (8th Cir. 1983); *Harriss v. Pan American World Airways, Inc.*, 649 F.2d 670 (9th Cir. 1980); *Stewart v. Smith*, 673 F.2d 485 (D.C. Cir. 1982).

quired American to demonstrate that its policies were "reasonably necessary." Because the jury charges are fundamentally different, and because entirely different issues are presented for review, the outcome of *Criswell* will have no bearing on this case.

Moreover, even if the legal issues were similar in *Criswell* and this case, the resolution of *Criswell* will not affect the outcome of this case, because the facts are entirely different.[12] The jury in this case, unlike in *Criswell*, found that the challenged pilot policies were reasonably necessary to the safety of the airline's flight operations. The jury's special verdict on that ultimate factual issue forecloses any serious attack on the judgment in this case.

CONCLUSION

The judgment below is based on a jury's determination by special verdict that American's policies are based on a BFOQ reasonably necessary to the safety of American's flight operations. That special verdict is based on a factual record that is unique to American Airlines, because no two airlines operate alike.

Petitioners do not challenge the jury's determination that American's policies enhance the safety of its operations. Instead, Petitioners urge this Court to reinterpret the BFOQ standard so as to require airlines to employ policies that concededly diminish flight safety.

Read as a whole, the trial court's jury instructions closely parallel the statutory language of the ADEA and

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[12] For example, Western precludes anyone from serving as a flight engineer past age 60. Western contended at trial that the same medical justifications underlying the Age 60 Rule's disqualification of age 60 pilots from serving as captains and copilots applied with equal force to disqualify any age 60 person from serving as a flight engineer. American made no such contention at trial and, in fact, permits professional flight engineers to serve until age 70.

the BFOQ precedents of the other circuits and of this Court.

Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

TRIAL COURT'S JURY INSTRUCTION

THE COURT: Members of the Jury: Now that you have heard all of the evidence and the argument of Counsel, it now becomes my duty to give you the instructions of the Court concerning the law applicable to this case.

It is your duty as Jurors to follow the law as I shall state it to you, and to apply that law to the facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by me.

Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty to base a verdict upon any view of the law other than that given in the instructions of the Court, just as it would also be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything other than the evidence in the case.

In deciding the facts of this case you must not be swayed by bias or prejudice or favor as to any party. Our system of law does not permit Jurors to be governed by prejudice or sympathy or public opinion. Both the parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the Court, and reach a just verdict regardless of the consequences.

The case should be considered and decided by you as as action between persons of equal standing in the community, and holding the same or similar stations in life. A corporation is entitled to the same fair trial at your hands as is a private individual. The law is no respecter

of persons, and all persons, including corporations, stand equal before the law and are to be dealt with as equals in a court of justice.

When a corporation is involved, of course, it may act only through natural persons as its agents or employees; and, in general, any agent or employee of a corporation may bind the corporation by his acts and declarations made while acting within the scope of his authority delegated to him by the corporation, or within the scope of his duties as an employee of the corporation.

As stated earlier, it is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. The term "evidence" includes the sworn testimony of the witnesses and the exhibits admitted in the record.

Remember that any statements, objections or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing to call your attention to certain facts or inferences that might otherwise escape your notice.

In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

So, while you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

Now, I have said that you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or "believability" of each witness and the weight to be given his testimony. In weighing the testimony of a witness you should consider his relationship to the Plaintiffs or to the Defendant; his interest, if any, in the outcome of the case; his manner of testifying, his opportunity to observe or acquire knowledge concerning the facts about which he testified; his candor, fairness and intelligence; and the extent to which he has been supported or contradicted by other credible evidence. You may, in short, accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or non-existence of any fact. You may find that the testimony of a smaller number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

A witness may be discredited or "impeached" by contradictory evidence, by a showing that he testified falsely concerning a material matter, or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness' present testimony.

If you believe that any witness has been so impeached, then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.

The rules of evidence provide that if scientific, technical, or other specialized knowledge might assist the Jury in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify and state his opinion concerning such matters.

You should consider each expert opinion received in evidence in this case and give it such weight as you may

think it deserves. If you should decide that the opinion of experience, or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, than you may disregard the opinion entirely.

The burden is on the Plaintiff in a civil action such as this to prove every essential element of his claim by a "preponderance of the evidence". A preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not true. In other words, to establish a claim by a "preponderance of the evidence" merely means to prove that the claim is more likely so than not so.

The same burden of proof applies to a Defendant's affirmative defense. If you find that a Plaintiff has established every essential element of his claim by a preponderance of the evidence, the burden is then on Defendant to prove every essential element of its affirmative defense by a preponderance of the evidence.

In determining whether any fact in issue has been proved by a preponderance of the evidence, the Jury may consider the testimony of all the witnesses, regardless of who may have called them, and all the exhibits received in evidence, regardless of who may have produced them. If the proof should fail to establish any essential element of Plaintiffs' claim by a preponderance of the evidence, the Jury should find for the Defendant as to the claim.

Similarly, if the proof should fail to establish any essential element of Defendant's affirmative defense by a preponderance of the evidence, the Jury should find for Plaintiffs.

PLAINTIFFS' CONTENTIONS

Plaintiffs in this action are twenty-two cockpit crew members who are or were employed by the Defendant

American Airlines. Plaintiffs contend that American has or will discriminate against them on the basis of age by requiring them to retire at age sixty and by refusing to allow them to work as flight officers in the flight engineer position on American's airplanes. Plaintiffs contend that the action of American violated the Age Discrimination in Employment Act (the ADEA).

Plaintiffs contend that the motivating factor which made a difference in American's decision against them was that they had reached age sixty. Plaintiffs contend that American has not proved that Plaintiffs cannot safely perform the job of flight officer, and has not proved that it is impossible or highly impractical to assess their performance as flight officers. Finally, Plaintiffs contend that American has not proved that the plaintiffs would interfere with the progression of American's younger pilots.

DEFENDANT'S CONTENTIONS

American contends that it did not discriminate against Plaintiffs on the basis of their age. American maintains that age was not a determining factor in that Plaintiffs after reaching sixty years of age were disqualified from serving as flight officers because they were no longer capable of progressing to the position of Captain. American further contends that even if age were a determining factor in its policy, it is not unlawful under the ADEA since it is justified as a bona fide occupational qualification reasonably necessary to the essence of American's business, which is safety. First, American contends that allowing former pilots to occupy the flight officer position would deny American the use of that position as an entry level training position in the cockpit line of progression. American maintains that this would interfere with the training and development of future Captains, and would make American's operation less safe now and in the future. Second, American contends that if its former Captains began serving as flight officers,

this reversal of authority roles would create an unsafe condition in the cockpit. American maintains that having the most senior, most experienced person in the subordinate flight officer position would create an unacceptable risk that this person would have an adverse effect on the safe performance of the cockpit crew.

Now I will discuss the Age Discrimination in Employment Act.

Under Federal law, it is unlawful for an employer to discriminate against any employee because of that employee's age, when the employee's age is between forty and seventy. Specifically, it is unlawful for an employer:

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.

It is not unlawful, however, for an employer to take any action otherwise prohibited by the Act when age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business.

Congress has declared that the purpose of the Age Discrimination in Employment Act is "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment."

Now, the FAA age 60 rule.

Testimony has been given in this case about the FAA or Federal Aviation Administration's Age 60 Rule.

You are instructed that the FAA's Age 60 Rule only applies to Captains and co-pilots.

DETERMINING FACTOR

The burden of proof is on the Plaintiffs to show discriminatory treatment on the basis of age by a preponderance of the evidence. Plaintiffs' claims of age discrimination are based on American's decision not to allow Plaintiffs to occupy the flight officer position upon reaching age 60. You must determine whether, taking the evidence as a whole, age was a determining factor in this action. You need not find that age was the only reason. If more than one factor was involved, Plaintiffs are still entitled to recover if one of the factors was their age and it made a difference in American's decision. It is sufficient if the Plaintiffs' age, in combination with some other reason acting at the same time, formed the basis for American's action.

Now, Bona Fide Occupational Qualification. If you find that Plaintiffs have proven by a preponderance of the evidence that their inability to continue in or transfer to the flight officer position was the result of policies in which age was a determining factor, then you must consider American's affirmative defense that age is a bona fide occupational qualification. One of the requirements for a bona fide occupational qualification is that it is reasonably necessary to the essence, or normal operation, of the employer's business, which in this case is the safe transportation of passengers. American need only show that it has a reasonable basis for its assessment of the safety risk involved.

American may show its policy is reasonably necessary to safety and is thus a bona fide occupational qualification in either one of two ways: American may show that there is a factual basis for believing that all or substantially all persons excluded by its policy would be unable to perform safely and efficiently as flight officers for

American after having lost their ability to serve as pilots; or American may show that it is impossible or impractical to determine on an individual basis which ones can safely perform, thereby justifying a reasonable, general rule. In determining whether American has a reasonable basis for believing that Plaintiffs would be unable to safely perform as flight officers, you may consider more than simply the individual Plaintiff's ability to perform the tasks of the flight officer job. You may also consider the effect that allowing Plaintiffs to serve as flight officers would have on the safety of American's operation because of its effect on its other employees, crew command structure, training program, or any other reason relating to safety.

WILLFUL VIOLATION

Should you find that age was a determining factor in American's treatment of Plaintiffs and that age was not a bona fide occupational qualification, you will be asked to determine whether American's violation of the ADEA was willful. The ADEA provides additional penalties when a violation is found to be willful. To prove willfulness, Plaintiffs need only show that American was aware that its actions were governed by the ADEA. Plaintiffs need not show that American acted maliciously or in bad faith.

(3)

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No. 84-1271

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

C.R. JOHNSON (Mrs.), et al.,

Petitioners,

v.

AMERICAN AIRLINES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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I.

THE DECISION BELOW IS SQUARELY IN CONFLICT WITH *TRANS WORLD AIRLINES, INC. V. THURSTON,* BECAUSE IT PERMITS A BFOQ TO BE ESTABLISHED BASED SOLELY ON THE EMPLOYEE'S INABILITY TO PERFORM A DIFFERENT JOB.

Respondent refused to employ petitioners as flight engineers after age 60 solely because the FAA's age 60 rule precluded them from serving as captains. Respondent summarized its position as follows:

> "[T]he only rule American Airlines had or has is that [ ] a person must be able to and be a future captain in order to be a flight officer." (Tr. 763)[1]

Terminating petitioners' employment because they can no longer serve in a different position than the one requested is squarely in conflict with *Trans World Airlines, Inc. v. Thurston*, ____ U.S. ____, 105 S.Ct. 613, 622-23 (1985), decided following the Fifth Circuit's decision in this case. In *TWA*, this Court stated that a denial of flight engineer employment, based solely on the inability to serve as captain after age sixty, violated the Age Discrimination in Employment Act because it was not the position of captain but rather the " 'particular' job of flight engineer from which the respondents were excluded by the discriminatory transfer policy." 105 S.Ct. at 622.

Nor can respondent credibly distinguish the decision in *TWA* on the ground that the airlines' operations are different. Both respondent and TWA are commercial airlines closely regulated by the FAA. They fly several of the same types of aircraft. Contrary to respondent's representation (Opp. at 11, n. 5), both permit downbidding (transfers) in a wide variety of circumstances.[2] Not only may

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[1] The vice-president responsible for respondent's age 60 compulsory retirement policy stated that one of the important considerations in his mind was the applicability of the FAA's age 60 rule. (Tr. 335-39) A second vice-president said that the only reason petitioners could not serve as flight engineers past sixty was because they "could no longer serve as a pilot." (Tr. 131) A third official explained that petitioners were not qualified for flight engineer service because they were "no longer promotable in the cockpit as a pilot." (Tr. 676)

[2] More than 800 downbids from pilot positions occurred during 1980-1982 alone (PX 790, 791; Tr. 167-68), with more pilots downbidding in status than promoting. (Tr. 169, 333) Respondent's statement that it " 'would' not permit any captain, regardless of age,

(Footnote continued on following page)

pilots on both airlines downbid voluntarily, but respondent sometimes requires its pilots to downbid when their services are needed in lower cockpit positions. (Tr. 143, 146, 147)

While respondent claims to rely on facially neutral policies (called "up-or-out" and "capable of progression"), those policies were presented as a denial of discrimination based on age, and were never offered to support an age-based BFOQ.[3] Moreover, the "up-or-out" requirement was satisfied by petitioners and the "capable of progression" provision, as applied to petitioners, was nothing more than a way of conditioning their employment on their ability to serve as a captain, a different position. This Court foreclosed such a device in *TWA*:

> [I]t is the "particular" job of flight engineer from which the respondents were excluded by the discriminatory transfer policy. * * * TWA can [not] make dependent upon the age of the individual the availability of a transfer to a position for which age is not a BFOQ.

TWA, 105 S.Ct. at 622, 623.

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[2] *continued*
voluntarily to downbid to the flight officer position" (Opp. at 4, see also 7, 11 n. 4) may be in reference to a policy for the future, but it is flatly contrary to the record, as well as to the trial court's summary judgment decision (App. 18), which confirmed the right of captains under age 60 to downbid to flight engineer positions. (Tr. 129-30, 136, 163-64, 173, 443, 675, 176-77, 316-17, 321, 323, 330, 694-96)

[3] Respondent's statement that new flight officers are "required to advance to copilot and, ultimately, to captain" (Opp. at 3) is misleading. Crewmembers are required, ultimately, to qualify for the next higher position, but are permitted, once qualified, to bid for any vacancy. (Tr. 675)

II.

THE DECISION BELOW PERMITTING AN EMPLOYER TO ESTABLISH A BFOQ WITH EVIDENCE UNRELATED TO AGE DISTORTS THE ADEA AND IS INCONSISTENT WITH THE NARROW INTERPRETATION FOR STATUTORY EXCEPTIONS REQUIRED IN *DOTHARD v. RAWLINSON.*

Respondent concedes that its BFOQ was based almost wholly on non-age justifications, despite the statutory requirement that "age" be a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. §623(f)(1). In support of its contention that a BFOQ may be founded on factors other than age, respondent cites this Court's decision in *Dothard v. Rawlinson*, 433 U.S. 321 (1979). (Opp. at 13-14) Respondent's erroneous reading of *Dothard*, if applied generally, would emasculate the ADEA and would broaden the BFOQ which "was in fact meant to be an extremely narrow exception." *Dothard*, 433 U.S. at 334.[4]

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[4] Respondent contends, despite a reluctance to do so below, that its refusal to employ the captain petitioners was based, in fact, on their age. In support, respondent relies on a remark by its expert that "people do become rigid as they get older." Unfortunately, respondent misquotes the testimony (*See* Tr. 510: "entirely *possible* that *some* senior Captains . . . would be *less* able to conform their behavior . . ."). Even more important, respondent never seriously relied on this testimony to support its BFOQ defense, nor could it. First, the remark—not tied to *any particular age*—is one of those bald stereotypical generalizations that the ADEA was enacted to prohibit and, second, it fails to address an essential element of respondent's burden: that "it is impossible or highly impractical to deal . . . on an individualized basis" with persons over 60 years of age. *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d at 236. According to respondent, its system of individual evaluation of crewmembers' abilities and crew coordination, even under simulated emergency conditions, is "almost a hundred percent." (Tr. 200)

In *Dothard*, sex was not merely tangentially involved, but was the essence of the women's disability. As noted by the Court, the correctional counselors against whom the BFOQ was asserted were unqualified because their "very womanhood would . . . undermine her capacity to provide . . . security. . . ." *Dothard*, 433 U.S. at 335-36. By contrast, the respondent here does not dispute the ability of flight engineers over 60 years of age to perform the job in question, nor does it defend its "policies" on the basis of any disability due to the statutorily-protected characteristic—age—as was the case in *Dothard*. Indeed, as respondent reminds the Court, it employs flight engineers to age 70.[5]

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[5] Petitioners Malandro, Fenton and Thompson are indistinguishable from respondent's career flight engineers. None served as a captain for respondent and all worked as flight engineers up to their sixtieth birthdays, when they were forced to retire. Respondent claims that these "non-captain age 60 pilots could not safely fill the flight officer [engineer] job because they would impede the training of American's future captains." (Opp. at 13) Like respondent's 480 career flight engineers, who also "impede," these four petitioners had sufficient seniority to serve on widebody equipment, which was not used for training upgrading flight engineers. (Tr. 228, 462) Petitioners' service as flight engineers to age 70 concededly would have no effect on the ability of anyone to accumulate the two or three years in the flight engineer job felt beneficial. (Tr. 229-30) Actually, respondent had no minimum flight engineer service requirement for its crewmembers. (Tr. 117-18) Some never served as flight engineers, or served as little as 30 days (Tr. 398A, 440-41); others served more than twelve years. (Tr. 439-40)

III.

REVIEW SHOULD BE GRANTED WHERE, AS HERE, THE BFOQ INSTRUCTION PERMITTED THE AGE-BASED DEFENSE TO BE ESTABLISHED WITHOUT REQUIRING THAT THE AGE LIMITATION BE "REASONABLY NECESSARY" TO THE OPERATION OF A COMMERCIAL AIRLINE AND WHERE, AS HERE, ANY REASON AT ALL—SO LONG AS IT WAS ARGUABLY SAFETY-RELATED—WAS ALLOWED TO SUPPORT THE BFOQ.

Respondent concedes that it had to prove that "age was a BFOQ 'reasonably necessary' to the safety of its operations" (Opp. at 10), but defends the trial court's jury instructions by arguing that they required the establishment of "policies" meeting the statutory standard of "reasonably necessary" rather than the lesser "reasonable" or "rational basis" standard. In fact, the jury instruction given by the trial court permitted the jury to conclude that respondent had established a BFOQ defense if it found that respondent's "policies" were merely "reasonable." Although the phrase "reasonably necessary" appears in the court's remarks to the jury, respondent fails to mention (Opp. at 16 n. 10) that the first reference was included as part of "Defendant's Contentions," while the others were part of a rote introduction to the technical statutory text, which was followed immediately by language explaining how the standard could be met.[6] The clear thrust of the instructions, taken as a whole, permitted respondent to argue as follows to the jury:

> American need only show it holds a reasonable basis for its assessment of safety risk involved. *It doesn't*

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[6] The trial court instructed that "American need only show that it has a reasonable basis for its assessment of the safety risk involved." (Tr. 789)

> *have to show that it was right*, but that it has a reasonable basis for its assessment of the safety risk involved. . . . You're the people to decide today whether American had a reasonable basis for believing as it did, if you reach that question.

Tr. 764 (emphasis supplied)

Not only did the BFOQ instruction apply an incorrect standard of proof, it also permitted the jury to find a BFOQ based on factors other than age.[7] Analysis of respondent's three references to the trial court's use of "age" in its instructions reveals that one was in the portion of the instructions describing defendant's contentions, while another was in the "willful violation" section, which the jury never considered in reaching its verdict. The third reference was prefatory to the BFOQ charge, and was followed immediately by an explanation that respondent could meet its statutory burden simply by presenting non-age related evidence, including evidence of "the effect that allowing Plaintiffs to serve as flight officers would have on the safety of . . . American's operations because of its effect on its other employees, crew command structure, training program, *or any other reason relating to safety*." (Tr. 790; emphasis supplied)[8]

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[7] Based on the court's jury instructions, the jury found that respondent's "policy not to allow plaintiffs to occupy or continue to occupy the flight officer position" was based on a bona fide occupational qualification. (Tr. 837) Respondent's claim that the jury found the policy to be "reasonably necessary to the safety of the airline's flight operations" and that such "policies enhanced the safety of its operations" (Opp. at 18) is simply argument and highlights the erroneous jury instruction below, as well as a special interrogatory not requiring the BFOQ to be based on age.

[8] Respondent contends, flatly contrary to the record, that petitioners failed to object to the BFOQ instruction on the ground that it stated only a "rational basis" or "reasonableness" stand-

(Footnote continued on following page)

IV.

REVIEW OF THE BFOQ JURY INSTRUCTION IN THE AIRLINE PILOT DOWNBIDDING CONTEXT IS PRESENTLY BEFORE THE COURT IN *WESTERN AIRLINES, INC. v. CRISWELL*, NO. 83-1545. THIS COURT SHOULD GRANT CERTIORARI TO ASSURE A CONSISTENT LEGAL INTERPRETATION.

Respondent boldly asserts that this Court's pending review of *Western Airlines, Inc. v. Criswell*, No. 83-1545, "will not affect the outcome of this case." Respondent, however, offers no distinction sufficient to warrant its claim that "entirely different issues are presented for review." (Opp. at 18)[9] And while the BFOQ instruction in *Western* was based virtually verbatim on *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 235 (5th Cir. 1976), the charge here differed significantly from *Tamiami*. By acknowledging "that a consistent legal standard must apply to all airlines . . ." (Opp. at 12), respondent concedes the necessity for providing a uniform statutory standard on the BFOQ defense.

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[8] *continued*
ard of proof, rather than the statutory "reasonably necessary" standard. (Opp. at 15) In fact, petitioner's counsel objected to the instruction specifically on this basis, stating that "to use a rational or reasonable standard in a BFOQ instruction is erroneous . . . and the words of the Statute "reasonable and necessary" (sic) should be followed and not the substitution of the lesser standard, "rational or reasonable basis." (Tr. 801; 798-99)

[9] In February 1984 Western Airlines permitted, without objection, the entry of a preliminary injunction returning age 60 captains to flight engineer positions *pendente lite*. Before that, it opposed flight engineer service after age 60. Respondent, on the other hand, permits its flight engineers to continue to age 70, except those who, like petitioners Malandro, Green, Thompson and Fenton, are not on the closed career flight engineer seniority list.

CONCLUSION

For the reasons stated above and in the Petition, a Writ of Certiorari should be issued to review the opinion and judgment of the Fifth Circuit.

Respectfully submitted,

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